

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of:	)	
	)	CG Docket No. 02-278
Petition of Zimmer Dental, Inc. d/b/a	)	
Zimmer Dental, Amy Beth Gerzog and	)	CG Docket No. 05-338
John Does 1-10 for Retroactive Waiver of	)	
47 C.F.R. § 64.1200(a)(4)(iv)	)	

**PETITION FOR RETROACTIVE WAIVER**

Pursuant to 47 C.F.R. §1.3 and paragraph 30 of the Federal Communications Commission’s Order, CG Docket Nos. 02-278, 05-338, FCC 14-164, 61 Communications Reg. (P&F) 671 (Oct. 30, 2014) (“the October 2014 Order”), Petitioners Zimmer Dental, Inc. d/b/a Zimmer Dental and its agents Amy Beth Gerzog and Jon Does 1-10 (“Zimmer Dental” or “Petitioners”) hereby request that the Federal Communication Commission (“FCC”) grant Zimmer Dental a retroactive waiver of 47 C.F.R. §64.1200(a)(4) and 47 U.S.C. §227(b)(1)(C) with respect to faxes transmitted by Petitioners or on their behalf with prior express consent or permission of the recipients or their agents after the effective date of the Rule.

**INTRODUCTION**

Petitioners are defendants in a putative class action originally filed in St. Louis County, Missouri. *Suzanne Degnen, D.M.D., P.C. d/b/a Sunset Tower Family Dentistry v. Zimmer Dental, Inc. d/b/a Zimmer Dental, Amy Beth Gerzog, and John Does 1-10*, Case No. 15SL-CC00587. That action alleges that Petitioners sent facsimile transmissions to Plaintiff and the putative class without a proper opt-out notice required by the Telephone Consumer Protection Act (“TCPA”), as amended by the Junk Fax Prevention Act of 2005, and the applicable regulations. 47 U.S.C. §227; 47 C.F.R. §64.1200. *See* Class Action Junk-Fax Petition, filed February 17, 2015 (“Petition”), attached hereto as Attachment A.

As indicated in Plaintiff's Petition, the facsimile transmissions sent to the plaintiff Suzanne Degnen, D.M.D., P.C., d/b/a Sunset Tower Family Dentistry contained information on how to opt-out from receiving such transmissions, but plaintiff alleges that the opt-out notice was insufficient under 47 C.F.R. 64.1200(a)(4) and 47 U.S.C. §227(b)(1)(C). *See* Petition at ¶¶ 45-48. Petitioners believe that most, if not all, of the facsimile transmissions sent to putative class members were sent with the recipients' prior express consent. Plaintiff's purported class action subjects Petitioners to potentially astronomical monetary damages for an alleged variation of the opt-out notice required for the facsimile transmissions, even though plaintiff expressly acknowledges that there was information provided by which it and putative class members could have opted out. Based on this good-faith effort and the logic of the October 2014 Order, a waiver is appropriate here and Petitioners request the FCC grant them a retroactive waiver of 47 U.S.C. §227 and 47 C.F.R. §64.1200.

### **ARGUMENT**

In the October 2014 Order, the FCC acknowledged that parties sending facsimile transmissions with prior express permission of recipients "may have reasonably been uncertain about whether [the] requirement for opt-out notices applied to them." *See* October 2014 Order at ¶1. The basis for this decision was language in the Junk Fax Protection Act of 2005 that states both that faxes sent with prior express permission must include an opt-out notice and that "the opt-out notice requirement only applies to communications that constitute *unsolicited* faxes." 21 FCC Rcd 3787, 3810 n. 154 (Apr. 6, 2006) (emphasis added). This contradiction led to industry-wide confusion about the requirement for opt-out notices in facsimile transmissions sent with prior permission, such as those in issue in Plaintiff's purported class action.

An “unsolicited advertisement” is “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.” 47 U.S.C. §227(a)(5). As indicated on the face of each of the facsimile transmissions cited to in Plaintiff’s purported class action, the transmission was sent to Plaintiff because it was registered as a customer of Zimmer Dental. *See* Plaintiff’s Petition at Exhibits 1-19. As such, Petitioners reasonably believed that they were within the provision of the Junk Fax Protection Act stating that the opt-out notice does not apply because the transmissions were not unsolicited. Therefore, a waiver is appropriate.

The October 2014 Order requests that petitioners make “every effort” to pursue a retroactive waiver on or prior to April 30, 2015. However, the FCC rules provide that the FCC may suspend, revoke, amend, or waive any of its rules at any time “for good cause shown.” 47 C.F.R. §1.3. A waiver is appropriate where it “better serve[s] the public interest” than strict application of the rule. *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

Here, Petitioners were served with the lawsuit in issue on June 17, 2015 and the faxes in issue were sent in 2014. *See* Petition, including Certificate of Service. No responsive pleading has yet been filed. No discovery has been conducted and Petitioners are still investigating plaintiff’s allegations. Petitioners have pursued this request for retroactive waiver as soon as reasonably possible after being served. Plaintiff has not and cannot allege that Petitioners have violated the FCC’s express mandate in October 2014 that all facsimile transmissions sent *after* the six-month window provided must include the precise opt-out language of Section 64.1200(a)(4). Petitioners are similarly situated in all material respects to those parties who have already received waivers in that Petitioners are potentially subject to a significant damage award on the basis of a rule the FCC has found caused significant confusion. Given the acknowledged

uncertainty in the rules prior to the October 2014 Order and the FCC's decision to offer retroactive waivers to those operating under a misconception based on that uncertainty, it does not serve the public interest to deny Petitioners a waiver in this case. Therefore, this case falls within the logic of the October 2014 Order and a retroactive waiver is appropriate.

Further, each facsimile transmission cited to in Plaintiff's purported class action *does* include information on how a party can opt out of receiving further transmissions. Each fax states "if you would like to be removed from our mailing list, please contact (877) 929-0952." *See* Plaintiff's Petition at Exhibits 1-19. This opt-out information does not comply with the specific notice requirements of 47 U.S.C. §227(b)(2)(D) and 47 C.F.R. §64.1200(a)(4)(iii). However, it does provide a means by which Plaintiff could have avoided its alleged damages. As such, it serves the public interest to grant a retroactive waiver to Petitioners in order to avoid institution of a potentially ruinous monetary penalty when the spirit of the rules was met with the provision of opt-out information. Petitioners are entitled to a waiver.

Accordingly, pursuant to the October 2014 Order and 47 C.F.R. §1.3, Petitioners respectfully seek a retroactive waiver of 47 U.S.C. §227(b)(2)(D) and 47 C.F.R. §64.1200(a)(4) for all facsimile transmissions previously sent by Petitioners or on their behalf with the recipients' prior express permission.

### **CONCLUSION**

Petitioners are similarly situated in all material respects to those entities who previously received waivers for noncompliance with the opt-out provisions of 47 U.S.C. §227(b)(2)(D) and 47 C.F.R. §64.1200(a)(4) pursuant to the FCC's October 2014 Order. In light of the FCC's acknowledgement of the confusion over the rules applicable to opt-out provisions in solicited facsimile transmissions and the potentially substantial liability for Petitioners resulting from said



confusion, the public interest is best served by the FCC's grant of a retroactive waiver to Petitioners. Therefore, Petitioners respectfully request a retroactive waiver from liability with respect to any facsimile transmissions sent by Petitioners with the prior express permission of the recipients or their agents, but which did not contain a proper opt-out notice as required by 47 U.S.C. §227(b)(2)(D) and 47 C.F.R. §64.1200(a)(4).

FOX GALVIN, LLC

By: /s/ Jonathan H. Garside

Jonathan H. Garside

Laura M. Robb

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Attorneys for Petitioners Zimmer Dental, Inc.  
d/b/a Zimmer Dental and Amy Beth Gerzog



CORPORATION SERVICE COMPANY\*

## Notice of Service of Process

Transmittal Number: 13920213  
Date Processed: 06/18/2015

Primary Contact: Byron Hayes  
Zimmer Holdings, Inc.  
1800 W Center Street  
Warsaw, IN 46580

Copy of transmittal only provided to: David Royster  
Chad Phipps  
Lisa Dunkin  
Maureen Smith

Entity:	Zimmer Dental Inc. Entity ID Number 2451829
Entity Served:	Zimmer Dental, Inc. dba Zimmer Dental
Title of Action:	Suzanne Degnen, D.M.D., P.C. d/b/a Sunset Tower Family Dentistry vs. Zimmer Dental, Inc. d/b/a Zimmer Dental
Document(s) Type:	Summons/Complaint
Nature of Action:	Class Action
Court/Agency:	St. Louis County Circuit Court, Missouri
Case/Reference No:	15SL-CC00587
Jurisdiction Served:	Indiana
Date Served on CSC:	06/17/2015
Answer or Appearance Due:	30 Days
Originally Served On:	CSC
How Served:	Personal Service
Sender Information:	Ronald J. Eisenberg 636-537-4645

RECEIVED BY

JUN 22 2015

LEGAL DEPARTMENT

Information contained on this transmittal form is for record keeping, notification and forwarding the attached document(s). It does not constitute a legal opinion. The recipient is responsible for interpreting the documents and taking appropriate action.

To avoid potential delay, please do not send your response to CSC  
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ATTACHMENT A



IN THE 21ST JUDICIAL CIRCUIT COURT, ST. LOUIS COUNTY, MISSOURI

Judge or Division: GLORIA CLARK RENO	Case Number: 15SL-CC00587
Plaintiff/Petitioner: SUZANNE DEGNEN, D.M.D., P.C. DBA: SUNSET TOWER FAMILY DENTISTRY	Plaintiff's/Petitioner's Attorney/Address: RONALD JAY EISENBERG 640 CEPI DRIVE SUITE A CHESTERFIELD, MO 63005
Defendant/Respondent: ZIMMER DENTAL, INC. DBA: ZIMMER DENTAL	Court Address: ST LOUIS COUNTY COURT BUILDING 7900 CARONDELET AVE CLAYTON, MO 63105
Nature of Suit: CC Injunction	

(Date File Stamp)

**Summons for Personal Service Outside the State of Missouri**  
(Except Attachment Action)

The State of Missouri to: ZIMMER DENTAL, INC.  
Alias:  
DBA: ZIMMER DENTAL

SERVE REGISTERED AGENT  
CORPORATION SERVICE COMPANY  
251 E. OHIO ST., STE. 500  
INDIANAPOLIS, IN 46204

COURT SEAL OF



ST. LOUIS COUNTY

You are summoned to appear before this court and to file your pleading to the petition, copy of which is attached, and to serve a copy of your pleading upon the attorney for the Plaintiff/Petitioner at the above address all within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to file your pleading, judgment by default will be taken against you for the relief demanded in this action.

SPECIAL NEEDS: If you have special needs addressed by the Americans With Disabilities Act, please notify the Office of the Circuit Clerk at 314-615-8029, FAX 314-615-8739 or TTY at 314-615-4567, at least three business days in advance of the court proceeding.

29-MAY-2015

Date

Further Information:  
TLC

*[Signature]*  
Clerk

**Officer's or Server's Affidavit of Service**

I certify that:

- I am authorized to serve process in civil actions within the state or territory where the above summons was served.
- My official title is \_\_\_\_\_ of \_\_\_\_\_ County, \_\_\_\_\_ (state).
- I have served the above summons by: (check one)
  - ☐ delivering a copy of the summons and a copy of the petition to the Defendant/Respondent.
  - ☐ leaving a copy of the summons and a copy of the petition at the dwelling place or usual abode of the Defendant/Respondent with \_\_\_\_\_, a person of the Defendant's/Respondent's family over the age of 15 years.
  - ☐ (for service on a corporation) delivering a copy of the summons and a copy of the petition to \_\_\_\_\_ (name) \_\_\_\_\_ (title).
  - ☐ other (describe) \_\_\_\_\_

Served at \_\_\_\_\_ (address)  
in \_\_\_\_\_ County, \_\_\_\_\_ (state), on \_\_\_\_\_ (date) at \_\_\_\_\_ (time).

Printed Name of Sheriff or Server

Signature of Sheriff or Server

Subscribed and Sworn To me before this \_\_\_\_\_ (day) \_\_\_\_\_ (month) \_\_\_\_\_ (year)

I am: (check one)

- ☐ the clerk of the court of which affiant is an officer.
- ☐ the judge of the court of which affiant is an officer.
- ☐ authorized to administer oaths in the state in which the affiant served the above summons. (use for out-of-state officer)
- ☐ authorized to administer oaths. (use for court-appointed server)

(Seal)

Signature and Title

Service Fees, if applicable

Summons \$ \_\_\_\_\_

Non Est \$ \_\_\_\_\_

Mileage \$ \_\_\_\_\_ ( \_\_\_\_\_ miles @ \$ \_\_\_\_\_ per mile)

Total \$ \_\_\_\_\_

See the following page for directions to clerk and to officer making return on service of summons.



### Directions to Clerk

Personal service outside the State of Missouri is permitted only upon certain conditions set forth in Rule 54. The clerk should insert in the summons the names of only the Defendant/Respondent or Defendants/Respondents who are to be personally served by the officer to whom the summons is delivered. The summons should be signed by the clerk or deputy clerk under the seal of the court and a copy of the summons and a copy of the petition for each Defendant/Respondent should be mailed along with the original summons to the officer who is to make service. The copy of the summons may be a carbon or other copy and should be signed and sealed in the same manner as the original but it is unnecessary to certify that the copy is a true copy. The copy of the motion may be a carbon or other copy and should be securely attached to the copy of the summons but need not be certified a true copy. If the Plaintiff's/Petitioner has no attorney, the Plaintiff's/Petitioner's address and telephone number should be stated in the appropriate square on the summons. This form is not for use in attachment actions. (See Rule 54.06, 54.07 and 54.14)

### Directions to Officer Making Return on Service of Summons

A copy of the summons and a copy of the motion must be served on each Defendant/Respondent. If any Defendant/Respondent refuses to receive the copy of the summons and motion when offered, the return shall be prepared accordingly so as to show the offer of the officer to deliver the summons and motion and the Defendant's/Respondent's refusal to receive the same.

Service shall be made: (1) On Individual. On an individual, including an infant or incompetent person not having a legally appointed guardian, by delivering a copy of the summons and motion to the individual personally or by leaving a copy of the summons and motion at the individual's dwelling house or usual place of abode with some person of the family over 15 years of age, or by delivering a copy of the summons and petition to an agent authorized by appointment or required by law to receive service of process; (2) On Guardian. On an infant or incompetent person who has a legally appointed guardian, by delivering a copy of the summons and motion to the guardian personally; (3) On Corporation, Partnership or Other Unincorporated Association. On a corporation, partnership or unincorporated association, by delivering a copy of the summons and motion to an officer, partner, or managing or general agent, or by leaving the copies at any business office of the Defendant/Respondent with the person having charge thereof or by delivering copies to its registered agent or to any other agent authorized by appointment or required by law to receive service of process; (4) On Public or Quasi-Public Corporation or Body. Upon a public, municipal, governmental or quasi-public corporation or body in the case of a county, to the mayor or city clerk or city attorney in the case of a city, to the chief executive officer in the case of any public, municipal, governmental, or quasi-public corporation or body or to any person otherwise lawfully so designated.

Service may be made by an officer or deputy authorized by law to serve process in civil actions within the state or territory where such service is made.

Service may be made in any state or territory of the United States. If served in a territory, substitute the word "territory" for the word "state."

The officer making the service must swear an affidavit before the clerk, deputy clerk, or judge of the court of which the person is an officer or other person authorized to administer oaths. This affidavit must state the time, place, and manner of service, the official character of the affiant, and the affiant's authority to serve process in civil actions within the state or territory where service is made.

Service must not be made less than ten days nor more than 30 days from the date the Defendant/Respondent is to appear in court. The return should be made promptly and in any event so that it will reach the Missouri Court within 30 days after service.



U.S.C. § 227, and the regulations promulgated thereunder (individually and collectively hereafter, "TCPA").

### **PARTIES, JURISDICTION, AND VENUE**

1. Plaintiff Suzanne Degnen, D.M.D., P.C. d/b/a Sunset Tower Family Dentistry is a Missouri corporation with its principal place of business in St. Louis County, Missouri.

2. Defendant Zimmer, Inc. d/b/a Zimmer Dental (Zimmer) is a Delaware corporation with its principal place of business in Warsaw, Indiana.

3. Zimmer had been registered with the Missouri Secretary of State from May 13, 2009, until its Application for Certificate of Withdrawal of Foreign Corporation was filed effective December 26, 2014.

4. Defendant Amy Beth Gerzog is an individual who, on information and belief, resides in California.

5. Gerzog is employed by Zimmer as an "Inside Sales Specialist."

6. John Does 1-10 are not presently known and will be identified through discovery.

7. This Court has personal jurisdiction over Defendants under 47 U.S.C. § 227(b)(3), because Defendants sent illegal faxes into Missouri, Defendants transacted business within this state, Defendants have made contracts within this state, Defendants have committed tortious acts within this state, such as conversion of fax recipients' paper, ink, and toner, and/or Defendants otherwise have sufficient minimum contacts with this state.

8. Venue is proper under the TCPA and/or under Missouri Revised Statutes § 508.010.2.

### THE FAXES

9. Defendants engaged in a prolonged junk-fax assault on Plaintiff.

10. On or about April 24, 2014, Defendants used a telephone facsimile machine, computer, or other device to send to Plaintiff's telephone facsimile machine at (314) 849-1139 an unsolicited advertisement, a true and accurate copy of which is attached as **Exhibit 1**.

11. On or about April 29, 2014, Defendants used a telephone facsimile machine, computer, or other device to send to Plaintiff's telephone facsimile machine at (314) 849-1139 an unsolicited advertisement, a true and accurate copy of which is attached as **Exhibit 2**.

12. On or about May 13, 2014, Defendants used a telephone facsimile machine, computer, or other device to send to Plaintiff's telephone facsimile machine at (314) 849-1139 an unsolicited advertisement, a true and accurate copy of which is attached as **Exhibit 3**.

13. On or about May 20, 2014, Defendants used a telephone facsimile machine, computer, or other device to send to Plaintiff's telephone facsimile machine at (314) 849-1139 an unsolicited advertisement, a true and accurate copy of which is attached as **Exhibit 4**.

14. On or about June 10, 2014, Defendants used a telephone facsimile machine, computer, or other device to send to Plaintiff's telephone facsimile



machine at (314) 849-1139 an unsolicited advertisement, a true and accurate copy of which is attached as **Exhibit 5**.

15. On or about June 17, 2014, Defendants used a telephone facsimile machine, computer, or other device to send to Plaintiff's telephone facsimile machine at (314) 849-1139 an unsolicited advertisement, a true and accurate copy of which is attached as **Exhibit 6**.

16. On or about June 24, 2014, Defendants used a telephone facsimile machine, computer, or other device to send to Plaintiff's telephone facsimile machine at (314) 849-1139 an unsolicited advertisement, a true and accurate copy of which is attached as **Exhibit 7**.

17. On or about July 8, 2014, Defendants used a telephone facsimile machine, computer, or other device to send to Plaintiff's telephone facsimile machine at (314) 849-1139 an unsolicited advertisement, a true and accurate copy of which is attached as **Exhibit 8**.

18. On or about August 5, 2014, Defendants used a telephone facsimile machine, computer, or other device to send to Plaintiff's telephone facsimile machine at (314) 849-1139 an unsolicited advertisement, a true and accurate copy of which is attached as **Exhibit 9**.

19. On or about August 20, 2014, Defendants used a telephone facsimile machine, computer, or other device to send to Plaintiff's telephone facsimile machine at (314) 849-1139 an unsolicited advertisement, a true and accurate copy of which is attached as **Exhibit 10**.

20. On or about August 26, 2014, Defendants used a telephone facsimile machine, computer, or other device to send to Plaintiff's telephone facsimile machine at (314) 849-1139 an unsolicited advertisement, a true and accurate copy of which is attached as **Exhibit 11**.

21. On or about September 2, 2014, Defendants used a telephone facsimile machine, computer, or other device to send to Plaintiff's telephone facsimile machine at (314) 849-1139 an unsolicited advertisement, a true and accurate copy of which is attached as **Exhibit 12**.

22. On or about September 9, 2014, Defendants used a telephone facsimile machine, computer, or other device to send to Plaintiff's telephone facsimile machine at (314) 849-1139 an unsolicited advertisement, a true and accurate copy of which is attached as **Exhibit 13**.

23. On or about September 16, 2014, Defendants used a telephone facsimile machine, computer, or other device to send to Plaintiff's telephone facsimile machine at (314) 849-1139 an unsolicited advertisement, a true and accurate copy of which is attached as **Exhibit 14**.

24. On or about September 30, 2014, Defendants used a telephone facsimile machine, computer, or other device to send to Plaintiff's telephone facsimile machine at (314) 849-1139 an unsolicited advertisement, a true and accurate copy of which is attached as **Exhibit 15**.

25. On or about October 7, 2014, Defendants used a telephone facsimile machine, computer, or other device to send to Plaintiff's telephone

facsimile machine at (314) 849-1139 an unsolicited advertisement, a true and accurate copy of which is attached as **Exhibit 16**.

26. On or about October 28, 2014, Defendants used a telephone facsimile machine, computer, or other device to send to Plaintiff's telephone facsimile machine at (314) 849-1139 an unsolicited advertisement, a true and accurate copy of which is attached as **Exhibit 17**.

27. On or about December 9, 2014, Defendants used a telephone facsimile machine, computer, or other device to send to Plaintiff's telephone facsimile machine at (314) 849-1139 an unsolicited advertisement, a true and accurate copy of which is attached as **Exhibit 18**.

28. On or about December 16, 2014, Defendants used a telephone facsimile machine, computer, or other device to send to Plaintiff's telephone facsimile machine at (314) 849-1139 another unsolicited advertisement, a true and accurate copy of which is attached as **Exhibit 19**.

29. Exhibits 1-19 are referred to collectively hereafter as "the Faxes."

30. Plaintiff received the Faxes through Plaintiff's facsimile machine.

31. The Faxes identified Defendant Amy Beth Gerzog as an Inside Sales Specialist and included her telephone number with extension, and her email address, [Amy.Gerzog@Zimmer.com](mailto:Amy.Gerzog@Zimmer.com), to contact her for details and pricing.

32. The Faxes falsely stated, "You have received this message because you are registered as a customer of Zimmer Dental."

33. Plaintiff was not a customer of Zimmer.



34. The Faxes provided a telephone number to call to be removed from Zimmer's "mailing list," but did not contain opt-out notices stating that failure to comply, within 30 days, of a recipient's request to the sender not to send future faxed advertisements is unlawful.

35. The Faxes' opt-out notices stated the following (with some of them including the contact number in bold typeface):

You have received this message because you are registered as a customer of Zimmer Dental. If you would like to be removed from our mailing list, please contact (877) 929-0952.

36. The Faxes' opt-out notices did not contain a facsimile machine number for a recipient to transmit a request to the sender not to send any future advertisements to a telephone facsimile machine or machines.

37. The Faxes constitute material advertising quality or commercial availability of any property, goods, or services, such as, but not limited to:



PUROS<sup>®</sup> PARTICULATE  
ALLOGRAFTS  
(.5 OR 1CC)



PUROS<sup>®</sup> DEMINERALIZED  
BONE MATRIX (DBM)  
PUTTY OR PUTTY WITH  
CHIPS (.5 OR 1CC)



INGENIOS<sup>™</sup> HA OR B-TCP  
BIOACTIVE SYNTHETIC  
BONE PARTICLES  
(.25, .5 OR 1CC)

(Exs. 1-2.)

38. On information and belief, Defendants have sent other facsimile transmissions of material advertising the quality or commercial availability of property, goods, or services to at least 40 other persons as part of a plan to broadcast fax advertisements, of which the Faxes are examples.

39. Defendants approved, authorized and participated in the scheme to broadcast fax advertisements by (a) directing a list to be purchased or assembled, (b) directing and supervising employees or third parties to send the faxes, (c) creating and approving the fax forms to be sent; and (d) determining the number and frequency of the facsimile transmissions.

40. Defendants had a high degree of involvement in, or actual notice of, the unlawful fax broadcasting activity and failed to take steps to prevent such facsimile transmissions.

41. Defendants created or made the Faxes and other fax advertisements, which Defendants sent to Plaintiff and to other members of the "Class" as defined below.

42. The Faxes, and the other similar or identical facsimile advertisements, are a part of Defendants' work or operations to market Defendants' products, goods, or services, and were sent by and on behalf of Defendants.

43. The Faxes and the other facsimile advertisements constitute material furnished in connection with Defendants' work or operations.

44. The Faxes sent to Plaintiff, and the other facsimile advertisements sent by Defendants, did not contain a proper notice that informs the recipient of the ability and means to avoid future unsolicited advertisements.

45. Defendants' similar facsimile advertisements, including the Faxes to Plaintiff, did not contain a notice stating that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a

telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under 47 C.F.R. § 64.1200(a)(4)(v) is unlawful.

46. They also lacked a fax number in which to send an opt-out request, as required by 47 C.F.R. § 64.1200(a)(4)(iii)(D)(1).

47. The transmissions of facsimile advertisements, including the Faxes, to Plaintiff, did not contain a notice that complied with 47 U.S.C. § 227(b)(1)(C) and 47 C.F.R. § 64.1200(a)(4)(iii).

48. The transmissions of facsimile advertisements, including the Faxes, to Plaintiff was required to contain a notice that complied with the provisions of 47 U.S.C. § 227(b)(1)(C) and 47 C.F.R. § 64.1200(a)(4)(iii).

49. On information and belief, Defendants sent multiple facsimile advertisements to Plaintiff and members of the Class throughout the time period covered by the Class definition below.

50. On information and belief, Defendants faxed the same and other facsimile advertisements to the members of the Class in Missouri and throughout the United States without first obtaining the recipients' prior express permission or invitation.

51. There is no reasonable means for Plaintiff or other Class members to avoid receiving unlawful faxes while at the same time receiving lawful faxes.

52. Defendants violated the TCPA by transmitting the Faxes to Plaintiff and to the Class members without obtaining their prior express permission or



invitation and by not displaying the proper opt-out notice required by 47 C.F.R. § 64.1200(a)(4).

53. Defendants knew or should have known that (a) facsimile advertisements, including the Faxes, were advertisements, (b) Plaintiff and the other Class members had not given their prior permission or invitation to receive facsimile advertisements, (c) no established business relationship existed with Plaintiff and the other Class members, and (d) Defendants' facsimile advertisements did not display a proper opt-out notice.

54. Defendants failed to determine correctly the legal restrictions on the use of facsimile transmissions and the application of those restrictions to facsimile advertisements, including the Faxes, both to Plaintiff and the Class.

55. The transmissions of facsimile advertisements, including the Faxes, to Plaintiff and the Class caused unwanted use and destruction of their property, including toner or ink and paper, and caused undesired wear on hardware.

56. The transmissions of facsimile advertisements, including the Faxes, to Plaintiff and to Class interfered with their exclusive use of their property.

57. The transmissions of facsimile advertisements, including the Faxes, to Plaintiff and the Class interfered with their business and/or personal communications and privacy interests.

## CLASS ACTION ALLEGATIONS

58. Plaintiff brings this class action on behalf of the following class of persons, hereafter, the "Class":

All persons who (1) on or after four years prior to the filing of this action, (2) were sent a telephone facsimile message of material advertising the commercial availability or quality of any property, goods, or services by or on behalf of Defendants, (3) with respect to whom Defendants cannot provide evidence of prior express permission or invitation for the sending of such faxes, (4) with whom Defendants do not have an established business relationship, (5) which did not state that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under 47 C.F.R. § 64.1200(a)(4)(v) is unlawful, or (6) which did not include a facsimile number for the recipient to send an opt-out request.

59. Excluded from the Class are Defendants, their employees, agents, and members of the judiciary.

60. This case is appropriate as a class action because:

a. Numerosity. On information and belief, based in part on review of the sophisticated Faxes and online research as to Defendants and their marketing practices, the Class includes at least 40 persons and is so numerous that joinder of all members is impracticable.

b. Commonality. Questions of fact or law common to the Class predominate over questions affecting only individual Class members, e.g.:

- i. Whether Defendants engaged in a pattern of sending unsolicited fax advertisements;
- ii. Whether the Faxes, and other faxes transmitted by or on behalf of Defendants, contain material advertising the commercial availability of any property, goods or services;



- iii. Whether the Faxes, and other faxes transmitted by or on behalf of Defendants, contain material advertising the quality of any property, goods or services;
- iv. The manner and method Defendants used to compile or obtain the list of fax numbers to which Defendants sent the Faxes and other unsolicited faxed advertisements;
- v. Whether Defendants faxed advertisements without first obtaining the recipients' prior express permission or invitation;
- vi. Whether Defendants violated 47 U.S.C. § 227;
- vii. Whether Defendants willingly or knowingly violated 47 U.S.C. § 227;
- viii. Whether Defendants violated 47 C.F.R. § 64.1200;
- ix. Whether the Faxes, and the other fax advertisements sent by or on behalf of Defendants, displayed the proper opt-out notice required by 47 C.F.R. § 64.1200(a)(4);
- x. Whether the Court should award statutory damages;
- xi. Whether the Court should award treble damages; and
- xii. Whether the Court should enjoin Defendants from sending TCPA-violating facsimile advertisements in the future.

c. Typicality. Plaintiff's claim is typical of the other Class members' claims, because, on information and belief, the Faxes were substantially the same as the faxes sent by or on behalf of Defendants to the Class, and Plaintiff is making the same claim and seeking the same relief for itself and all Class members based on the same statute and regulation. Although the Faxes advertised some different products, the opt-out language in the Faxes was identical or nearly identical.

d. Adequacy. Plaintiff will fairly and adequately protect the interests of the other Class members. Plaintiff's counsel are experienced in class actions and TCPA claims. Neither Plaintiff nor Plaintiff's counsel has interests adverse or in conflict with the absent Class members.

e. Superiority. A class action is the superior method for adjudicating this controversy fairly and efficiently. The interest of each individual Class member in controlling the prosecution of separate claims is small and individual actions are not economically feasible.

61. The TCPA prohibits the "use of any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1).

62. The TCPA defines "unsolicited advertisement," as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's express invitation or permission." 47 U.S.C. § 227(a)(4).

63. The TCPA provides:

Private right of action. A person may, if otherwise permitted by the laws or rules of court of a state, bring in an appropriate court of that state:

(A) An action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) An action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or

(C) Both such actions.

47 U.S.C. § 227(b)(3)(A)-(C).

64. The TCPA also provides that that Court, in its discretion, may treble the statutory damages if a defendant "willfully or knowingly" violated Section 227(b) or the regulations prescribed thereunder.

65. "A facsimile broadcaster will be liable for violations of [Section 64.1200(a)(4)]. . . , including the inclusion of opt-out notices on unsolicited advertisements, if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions." 47 C.F.R. § 64.1200(a)(4)(vii).

66. Because the TCPA is a strict liability statute; Defendants are liable to Plaintiff and the Class even if Defendants only acted negligently.

67. Defendants' actions caused damage to Plaintiff and the Class, as
- a. receiving Defendants' faxed advertisements caused the recipients to lose paper and toner consumed in printing Defendants' faxes;
  - b. Defendants' actions interfered with the recipients' use of the recipients' fax machines and telephone lines;
  - c. Defendants' faxes cost the recipients time, which was wasted time receiving, reviewing, and routing the unlawful faxes, and such time otherwise would have been spent on business activities; and
  - d. Defendants' faxes unlawfully interrupted the recipients' privacy interests in being left alone.

68. Defendants intended to cause damage to Plaintiff and the Class, to violate their privacy, to interfere with the recipients' fax machines, or to

consume the recipients' valuable time with Defendants' advertisements; therefore, treble damages are warranted under 47 U.S.C. § 227(b)(3).

69. Defendants knew or should have known that (a) Plaintiff and the other Class members had not given express permission or invitation for Defendants or anyone else to fax advertisements about Defendants' property, goods, or services, (b) Defendants did not have an established business relationship with Plaintiff and the other Class members, (c) the Faxes and the other facsimile advertisements were advertisements, and (d) the Faxes and the other facsimile advertisements did not display a proper opt-out notice containing a fax number to request no more faxed advertisements and 30-day language.

70. Defendants violated the TCPA by transmitting the Faxes to Plaintiff and substantially similar facsimile advertisements to the other Class members without obtaining their prior express permission or invitation and by not displaying the proper opt-out notice required by 47 C.F.R. § 64.1200(a)(4)(iii).

WHEREFORE, Plaintiff Suzanne Degnen, D.M.D., P.C. d/b/a Sunset Tower Family Dentistry, individually and on behalf of all others similarly situated, demands judgment in its favor and against all Defendants Zimmer Dental, Inc. d/b/a Zimmer Dental, Amy Beth Gerzog, and John Does 1-10, jointly and severally, as follows:

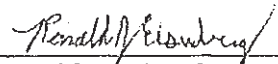
- a. certify this action as a class action and appoint Plaintiff as Class representative;
- b. appoint the undersigned counsel as Class counsel;
- c. award damages of \$500 per facsimile pursuant to 47 U.S.C. § 227(a)(3)(B);



- d. award treble damages up to \$1,500 per facsimile pursuant to 47 U.S.C. § 227(a)(3);
- e. enjoin Defendants and their contractors, agents, and employees from continuing to send TCPA-violating facsimiles pursuant to 47 U.S.C. § 227(a)(3)(A);
- f. award class counsel reasonable attorneys' fees and all expenses of this action and require Defendants to pay the costs and expenses of class notice and claim administration;
- g. award Plaintiff an incentive award based upon its time expended on behalf of the Class and other relevant factors;
- h. award Plaintiff prejudgment interest and costs; and
- i. grant Plaintiff all other relief deemed just and proper.

SCHULTZ & ASSOCIATES LLP

By:

  
Ronald J. Eisenberg, #48674  
Robert Schultz, #35329  
640 Cepi Drive, Suite A  
Chesterfield, MO 63005-1221  
(636) 537-4645  
Fax: (636) 537-2599  
[reisenberg@sl-lawyers.com](mailto:reisenberg@sl-lawyers.com)  
[rschultz@sl-lawyers.com](mailto:rschultz@sl-lawyers.com)

*Attorneys for Plaintiff*

# ZIMMER® SOCKET PRESERVATION SPECIAL



## PURCHASE ONE OF THESE:



**PUROS® PARTICULATE  
ALLOGRAFTS  
(.5 OR 1CC)**



**PUROS® DEMINERALIZED  
BONE MATRIX (DBM)  
PUTTY OR PUTTY WITH  
CHIPS (.5 OR 1CC)**



**INGENIOS™ HA OR B-TCP  
BIOACTIVE SYNTHETIC  
BONE PARTICLES  
(.25, .5 OR 1CC)**

## AND ONE OF THESE:



**BIOMEND® MEMBRANES**



**ZIMMER® SOCKET REPAIR  
MEMBRANE**



**A BOX OF ZIMMER®  
COLLAGEN WOUND  
DRESSINGS  
(1 BOX = 10 UNITS)**

## AND RECEIVE A 15% DISCOUNT.

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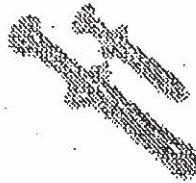
# ZIMMER® SOCKET PRESERVATION SPECIAL



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(.5 OR 1CC)**

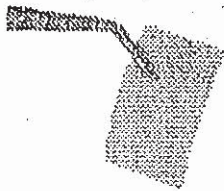


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CHIPS (.5 OR 1CC)**

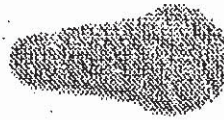


**INGENIOS® HA OR B-TCP  
BIOACTIVE SYNTHETIC  
BONE PARTICLES  
(.25, .5 OR 1CC)**

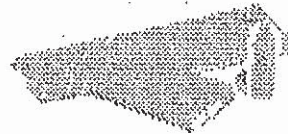
## AND ONE OF THESE:



**BIOMEND® MEMBRANES**



**ZIMMER® SOCKET REPAIR  
MEMBRANE**



**A BOX OF ZIMMER®  
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DRESSINGS  
(1 BOX = 10 UNITS)**

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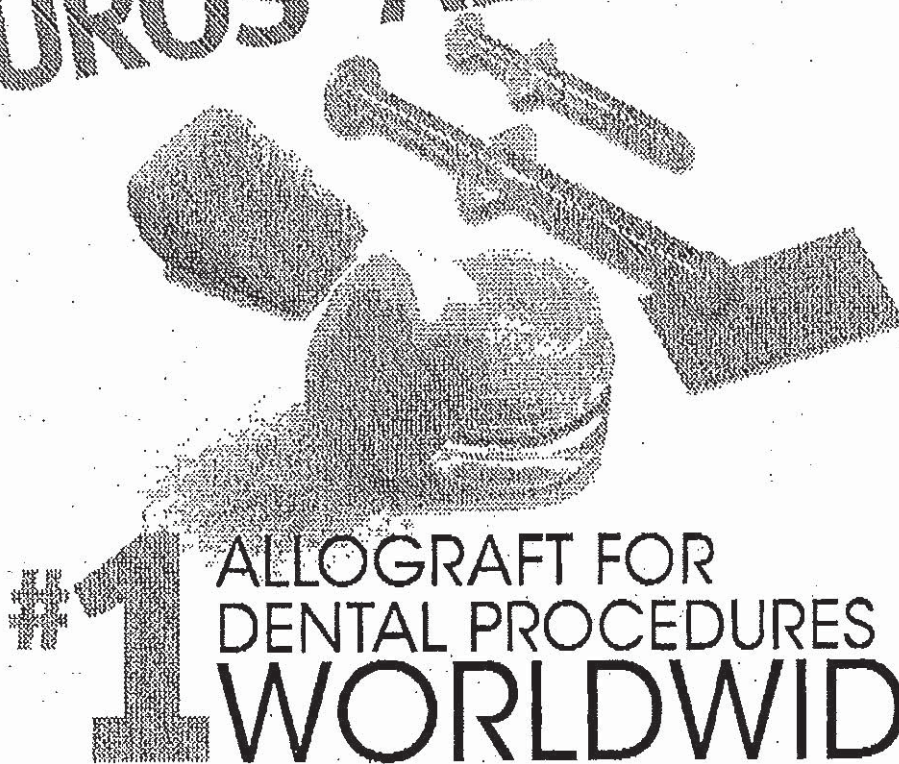
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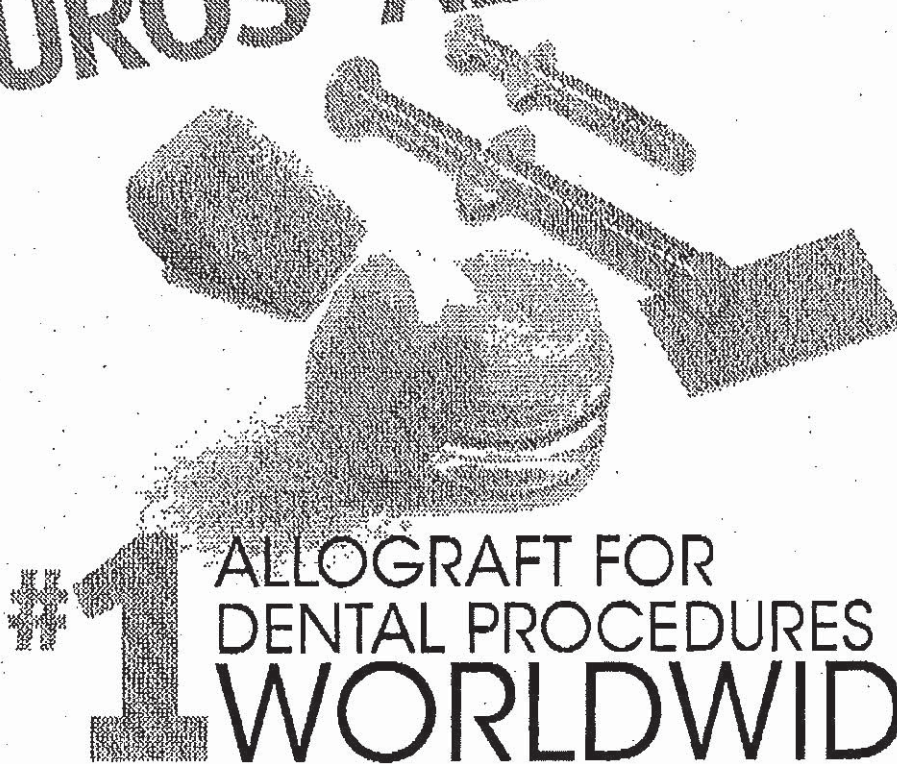
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PUROS® ALLOGRAFT****#1 ALLOGRAFT FOR  
DENTAL PROCEDURES  
WORLDWIDE****IN ORDER TO TAKE ADVANTAGE OF THIS LIMITED TIME  
OFFER, ORDERS MUST BE PLACED BY MAY 30, 2014****\*TO ORDER, PLEASE CONTACT YOUR SALES SPECIALIST:**Amy Beth Gerzog - Inside Sales Specialist  
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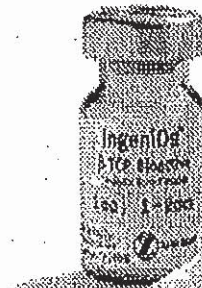
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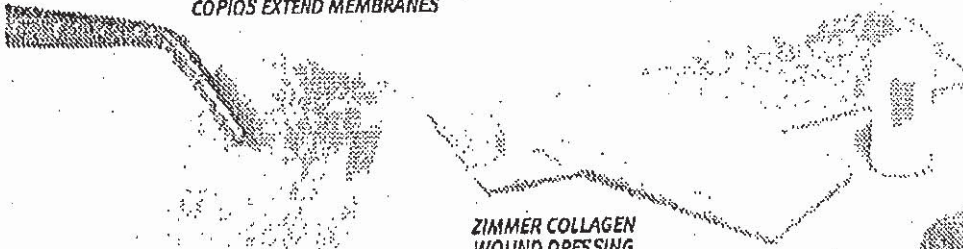
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MEMBRANES



INGENIOS SYNTHETIC  
BONE PARTICLES



COPIOS EXTEND MEMBRANES



ZIMMER COLLAGEN  
WOUND DRESSING



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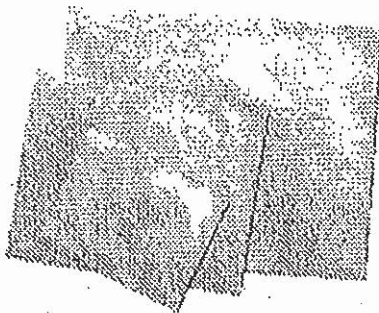
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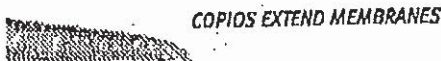
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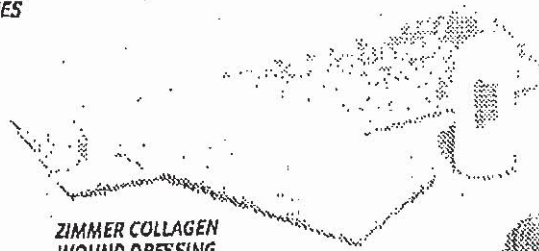
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ABSORBABLE COLLAGEN  
MEMBRANES



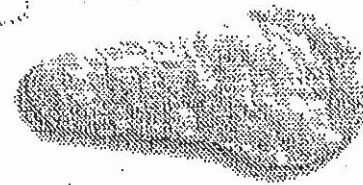
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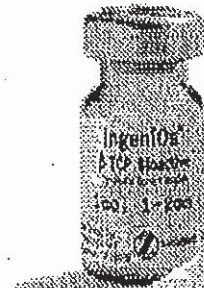
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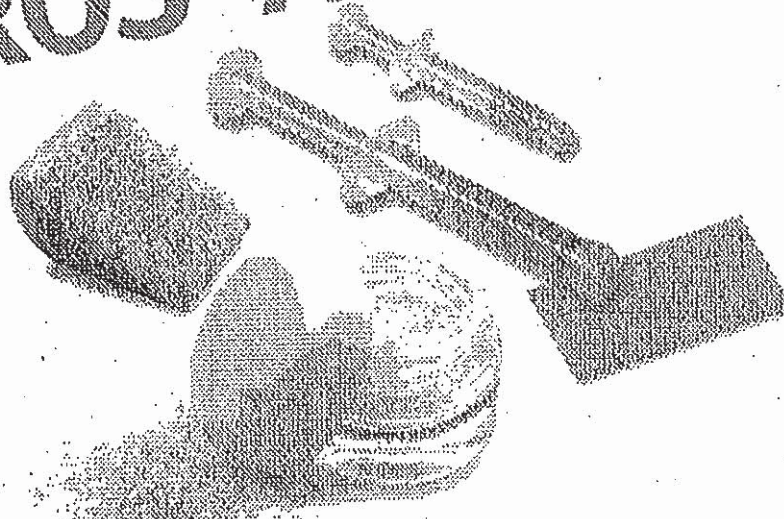
Ex. 7



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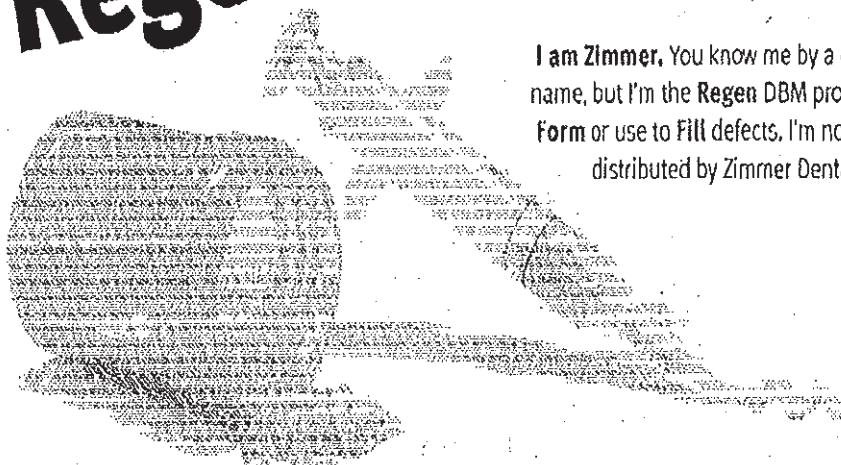
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I am Zimmer. You know me by a different name, but I'm the Regen DBM product you Form or use to Fill defects. I'm now being distributed by Zimmer Dental.

Purchase **6** units of the same  
RegenaVate part number, for the  
total list price of **5** units.

May purchase promo more than once but must always be in increments of 6.

Valid only with purchase of 6 of the same part number.

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Amy Beth Gerzog 800-854-7019 x 4192

Amy.Gerzog@Zimmer.com

PROMO CODE:

RV1

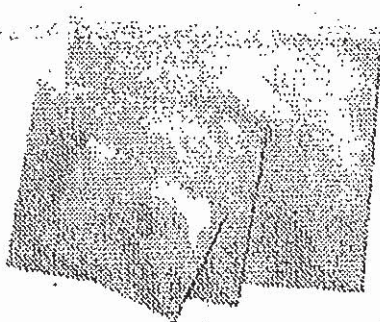
TAKE ADVANTAGE OF THIS LIMITED TIME OFFER,  
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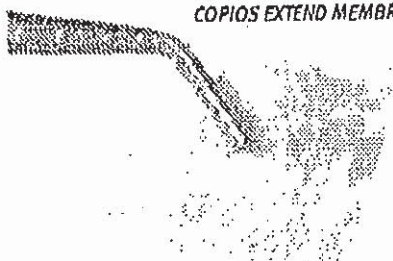
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ABSORBABLE COLLAGEN  
MEMBRANES



INGENIOS SYNTHETIC  
BONE PARTICLES



COPIOS EXTEND MEMBRANES



ZIMMER COLLAGEN  
WOUND DRESSING



ZIMMER SOCKET REPAIR  
MEMBRANES

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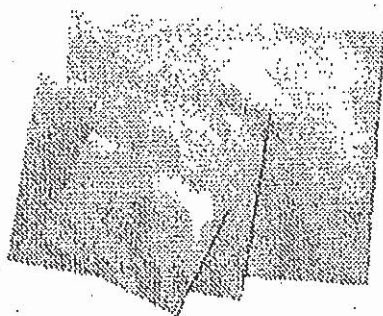
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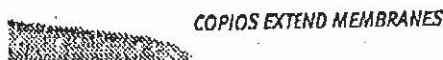
**Purchase 10 or more** packages of BioMend<sup>®</sup>, BioMend Extend<sup>™</sup>, Zimmer<sup>®</sup> Socket Repair Membranes, or Zimmer<sup>®</sup> Collagen Wound Dressings CopiOs Extend<sup>™</sup>, IngeniOs<sup>®</sup>  $\beta$ -TCP or IngeniOs<sup>®</sup> HA and receive **up to a 35% discount**.



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ABSORBABLE COLLAGEN  
MEMBRANES



INGENIOS SYNTHETIC  
BONE PARTICLES



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ZIMMER COLLAGEN  
WOUND DRESSING

ZIMMER SOCKET REPAIR  
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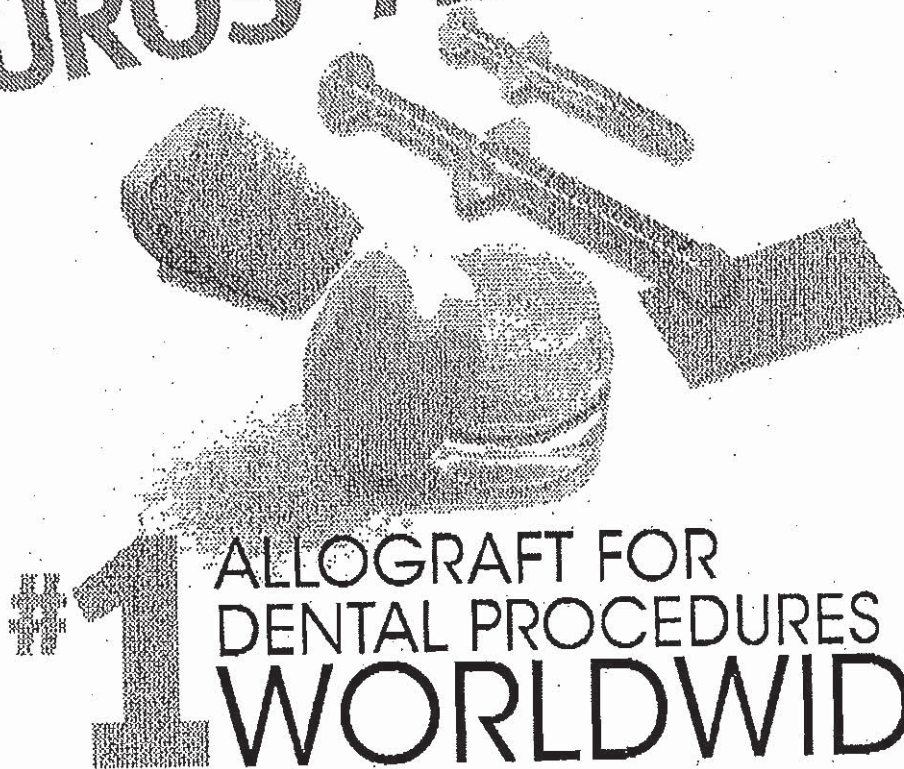
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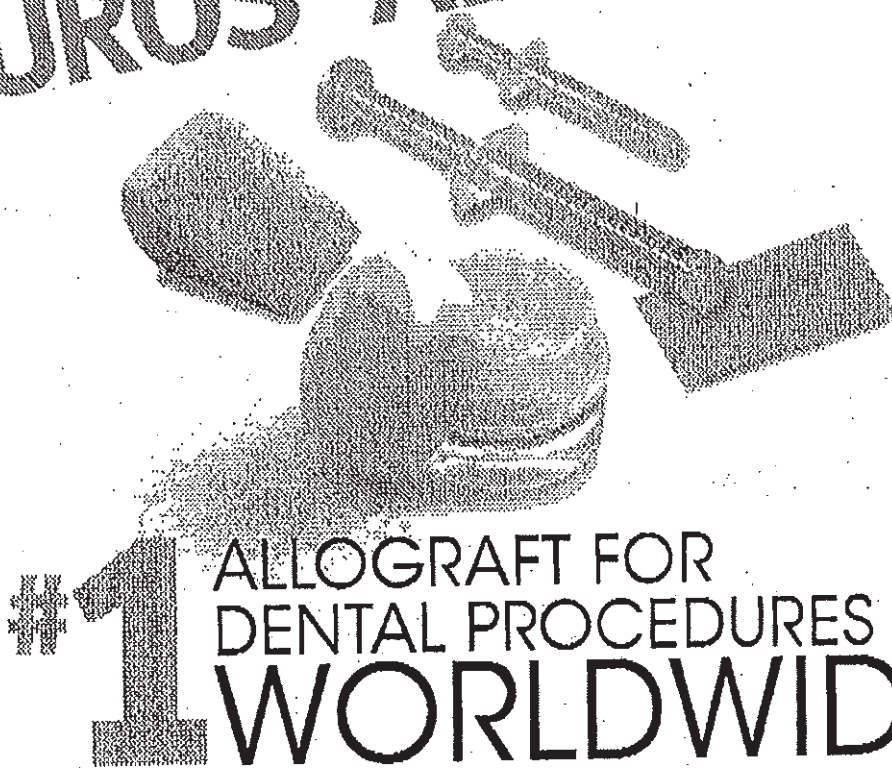
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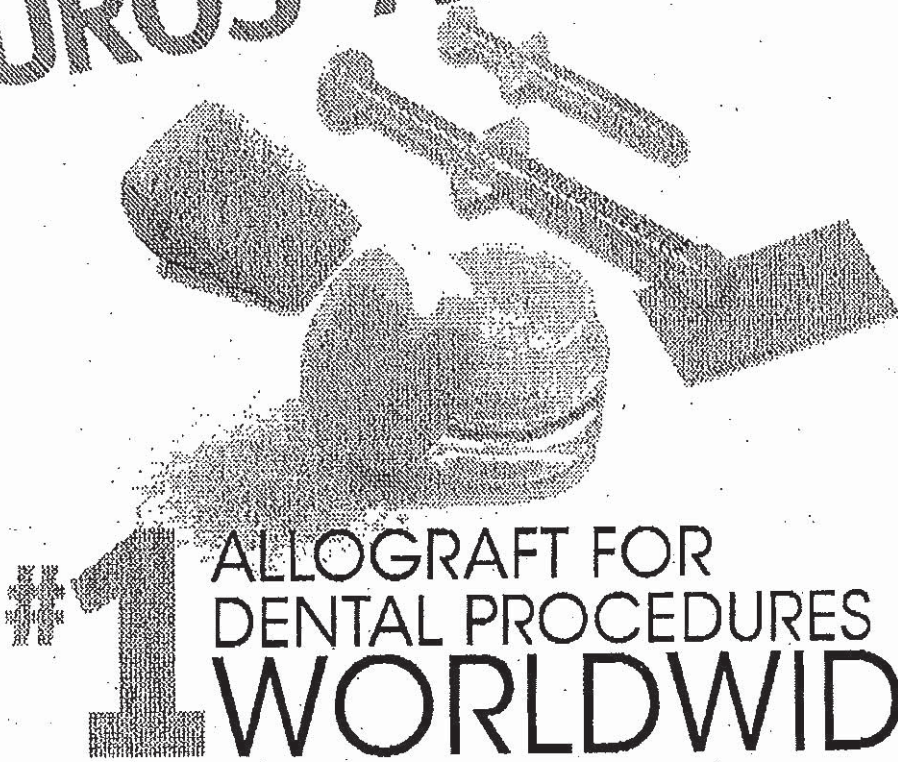
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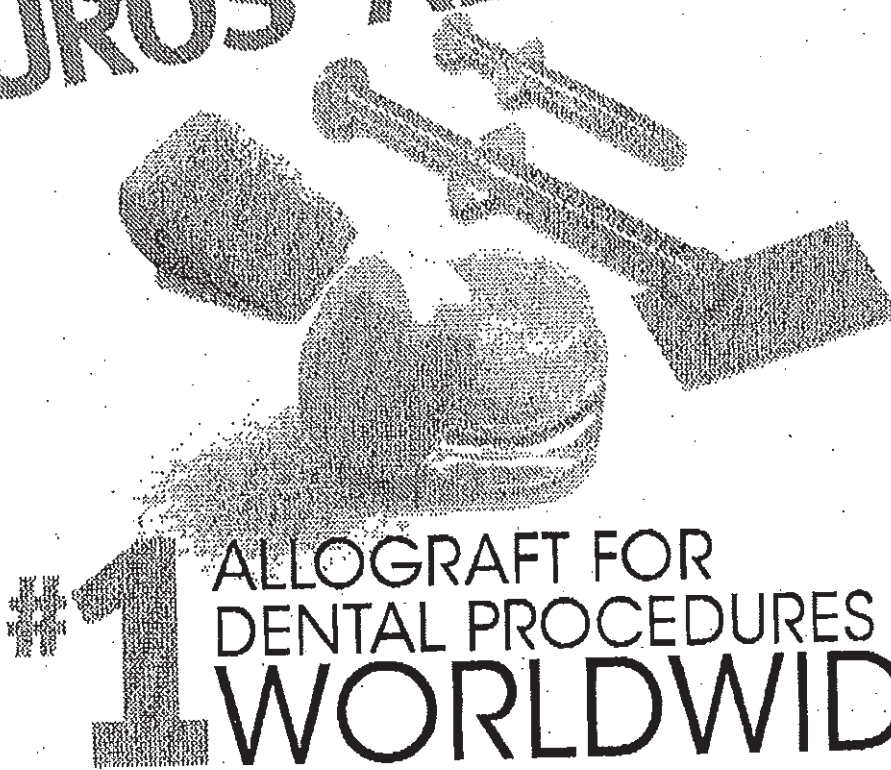
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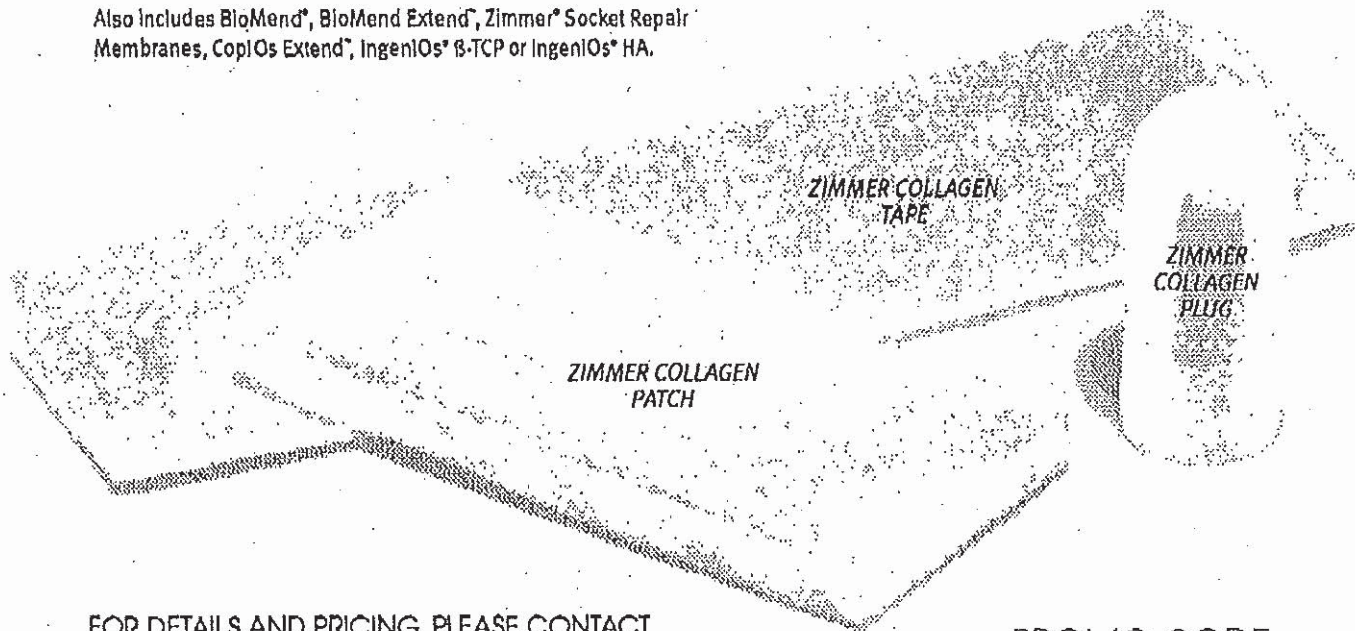
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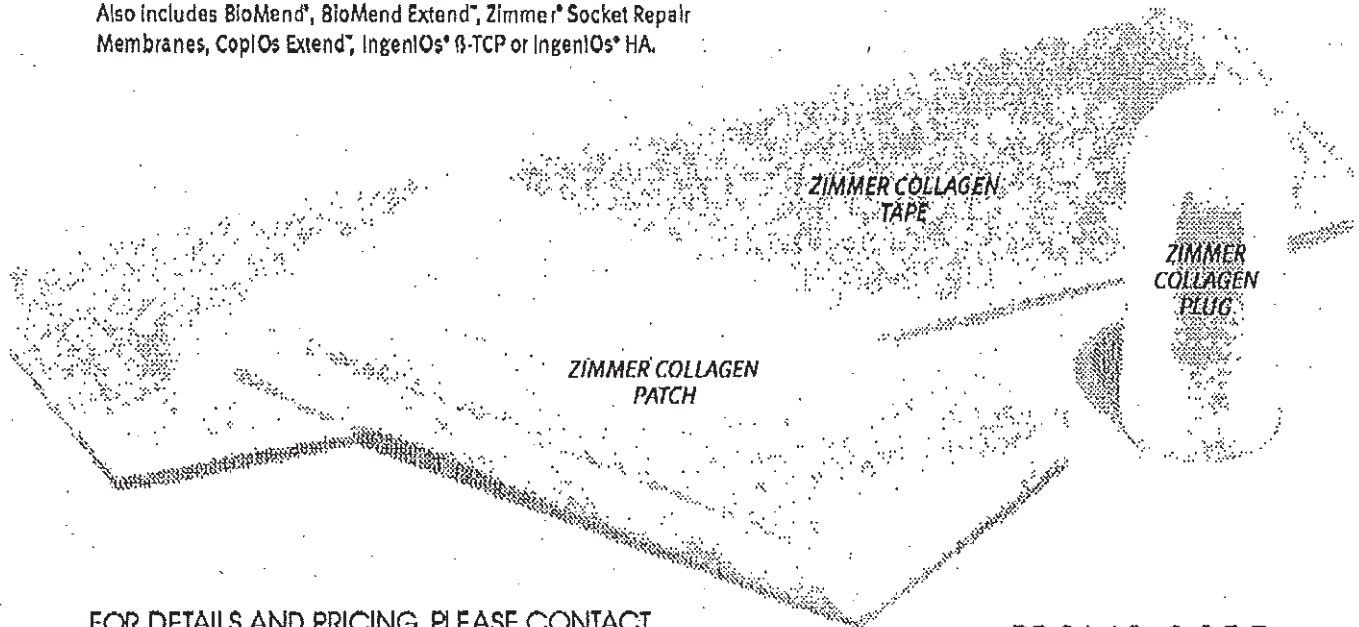


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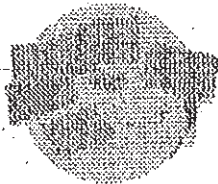
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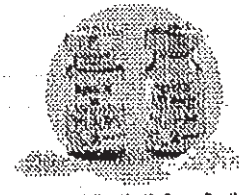
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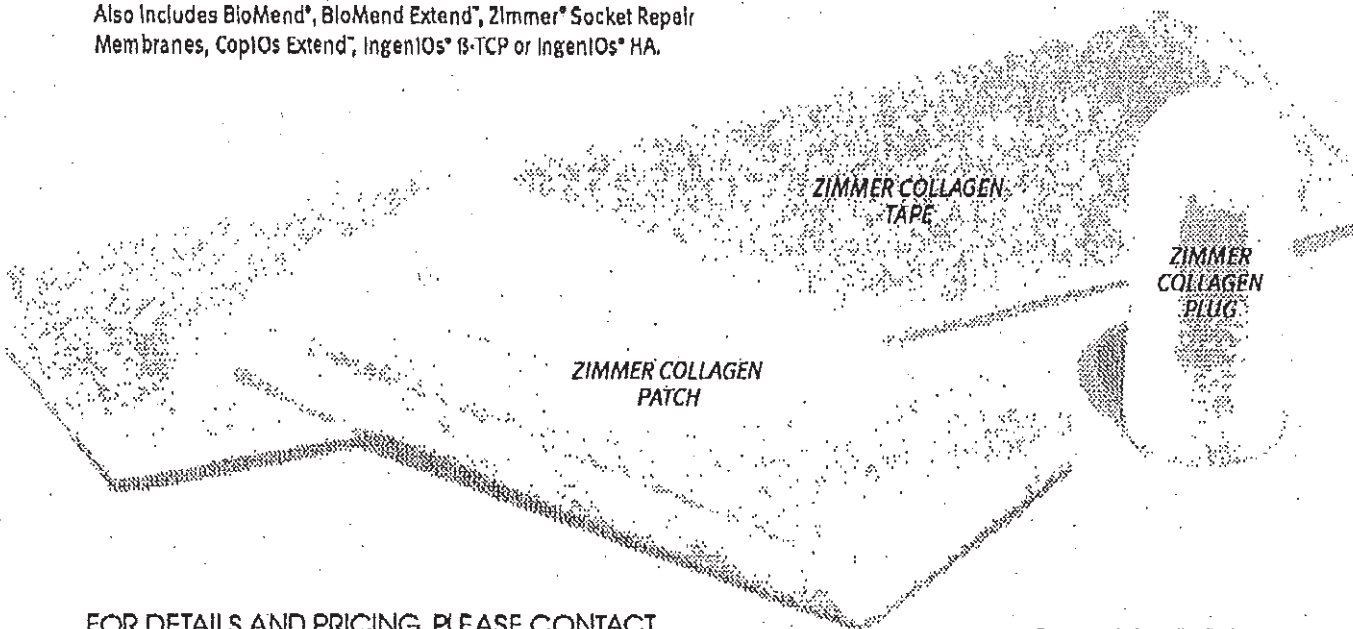
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